



Signed and Filed: December 23, 2013

A handwritten signature in dark ink, appearing to read "T E Carlson".

THOMAS E. CARLSON U.S. Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

In re)	Case No. 04-33526 TEC
)	
DEMAS WAI YAN,)	Chapter 7
)	
)	
Debtor.)	
)	
DEMAS WAI YAN,)	Adv. Proc. No. 12-3129 TC
)	
Plaintiff,)	
)	
vs.)	
)	
TONY FU, STELLA CHEN, WEI SUEN,)	
BRYANT FU, and CRYSTAL LEI,)	
)	
Defendants.)	
)	

MEMORANDUM DECISION RE RULE 12(B)(6) MOTION TO DISMISS

Defendant Tony Fu moves under Rule 12(b)(6) motion to dismiss this action. Plaintiff Demas Yan (Yan) appeared *in pro per*. Defendant Tony Fu (Fu) appeared *in pro per*. Michael J. Betz appeared for Crystal Lei (Lei).

The court grants motion to dismiss in part, as follows:

Intentional Infliction of Emotional Distress. The court grants Fu's motion to dismiss Yan's first claim for relief for intentional infliction of emotional distress without leave to amend to the

1 extent that it asserts any claim related to the Chenery Property or
2 any claim related to the purchase of building supplies on behalf of
3 San Francisco Building Professionals, Inc. (SFBP), embezzlement of
4 funds of SFBP, or inducing SFBP to sue Yan. Such claims were
5 previously disposed of by the Bankruptcy Court Judgment and by the
6 Lei Settlement, and Yan has no authority to assert this pre-petition
7 claim following revocation of the Abandonment Order.

8 The court grants Fu's motion to dismiss the remainder of Yan's
9 first claim for relief without prejudice to Yan's right to file a
10 request for leave to file an amended complaint, because the
11 complaint does not allege: (1) extreme and outrageous conduct by the
12 defendant; (2) the defendant's intention of causing or reckless
13 disregard of the probability of causing emotional distress; (3) the
14 plaintiff's suffering severe or extreme emotional distress; and (4)
15 actual and proximate causation of the emotional distress by the
16 defendant's outrageous conduct. See Cole v. Fair Oaks Fire Prot.
17 Dist., 43 Cal.3d 148, 155 (1987).

18 Breach of Fiduciary Duty. The court grants Fu's motion to
19 dismiss Yan's second claim for relief for breach of fiduciary duty
20 without leave to amend to the extent that it asserts any claim
21 related to the Chenery Property or any claim related to the purchase
22 of building supplies on behalf of SFBP, embezzlement of funds of
23 SFBP, or inducing SFBP to sue Yan. This claim was previously
24 disposed of by the Bankruptcy Court Judgment and by the Lei
25 Settlement, and Yan has no authority to assert this pre-petition
26 claim following revocation of the Abandonment Order.

27 The court grants Fu's motion to dismiss Yan's second claim for
28 relief for breach of fiduciary duty without prejudice to Yan's right

1 to file a request for leave to file an amended complaint, because
2 the complaint does not allege: (1) the existence of a (post-
3 petition) fiduciary duty; (2) the breach of that duty; and (3)
4 damages proximately caused by that breach. See Mosier v. S. Cal.
5 Physicians Ins. Exch., 63 Cal.App.4th 1022, 1044 (1988).

6 Fraudulent Transfer. The court grants Fu's motion to dismiss
7 Yan's third claim for relief for fraudulent transfer without leave
8 to amend because this claim is virtually identical to the claim Yan
9 asserted against all Defendants in his cross-complaint in the Fu
10 Defamation Action, and because this court dismissed that claim
11 without leave to amend.

12 Unauthorized Practice of Law. The court grants Fu's motion to
13 dismiss Yan's fourth claim for relief for the unauthorized practice
14 of law without prejudice to Yan's right to file a request for leave
15 to file an amended complaint, because the complaint does not state
16 facts sufficient to allow the court to determine whether the alleged
17 actions of Fu or Lei could be construed as the unauthorized practice
18 of law pursuant to California Business & Professions Code section
19 6125. See Morgan v. State Bar, 51 Cal.3d 598, 603 (1990) ("[t]he
20 cases uniformly hold that the character of the act, and not the
21 place where it is performed, is the decisive element, and if the
22 application of legal knowledge and technique is required, the
23 activity constitutes the practice of law") (citations omitted).

24 Malicious Prosecution. The court grants Fu's motion to dismiss
25 Yan's fifth claim for relief for malicious prosecution without
26 prejudice to Yan's right to file a request for leave to file an
27 amended complaint, because the complaint does not allege that the
28 prior action: (1) was commenced by or at the direction of the

1 defendant and was pursued to a legal termination in plaintiff's
2 favor; (2) was brought without probable cause; and (3) was initiated
3 with malice. See Paiva v. Nichols, 168 Cal.App.4th 1007, 1018
4 (2008) (citations omitted).

5 Declaratory Relief. The court grants Fu's motion to dismiss
6 Yan's sixth claim for relief for declaratory relief without leave to
7 amend because the Bankruptcy Court Judgment disposed of all claims
8 related to the Chenery Property, because all pre-petition claims of
9 Yan remain property of the estate and Yan has no authority to assert
10 these claims on behalf of the estate, and because District Court
11 Judge Richard G. Seeborg previously rejected Yan's argument
12 regarding the doctrine of continuing wrong and accrual of actions
13 based on his claims for relief for intentional infliction of
14 emotional distress and breach of fiduciary duty. See Case No. 10-
15 3152, Docket No. 108.

16 The proposed amended complaint attached to any request for
17 leave to file such complaint shall allege with specificity the dates
18 of occurrence of all acts giving rise to the relief requested.

19 ****END OF MEMORANDUM DECISION****

Court Service List

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